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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

**KAREN TRINH, DDS., INC., a California
Corporation,**

Plaintiff,

vs.

**STATE FARM GENERAL INSURANCE
COMPANY, an Illinois Corporation doing
business in California; AND DOES 1 TO 50,
INCLUSIVE.**

Defendants.

Case No.: 5:20-cv-04265-BLF

**PLAINTIFF'S OPPOSITION TO
DEFENDANT STATE FARM GENERAL
INSURANCE COMPANY'S MOTION TO
DISMISS FOR FAILURE TO STATE A
CLAIM**

[Fed. R. Civ. Pro. 12(b)(6)]

Date: November 12, 2020
Time: 9:00 A.M.
Location: 280 South Street
San Jose, CA 95113
Courtroom 3 – 4th floor
Judge: Hon. Beth Labson Freeman

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I. INTRODUCTION

The suspension of business operations caused by the unprecedented COVID-19 pandemic was the exact kind of loss insurers marketed they would cover to potential purchasers of their policies. But as the pandemic unfolded and local ordinances suspended partially or fully operations at tens of thousands of businesses, insurance companies, including Defendant State Farm General Insurance Company (“State Farm”), balked. Though its policy was an all-risk policy and expressly provided civil ordinance coverage, State Farm began an immediate campaign to block consumers from even tendering coverage, and then summarily denied coverage. In a similar fashion, State Farm wishes to now prematurely deny Plaintiff’s ability to have these historic questions of coverage litigated fairly with evidence before a trier of fact. They would instead have the Court discount the plain language of their policies, the ambiguities of their own making, and bedrock principles of concurrent causation – and essentially dismiss Plaintiff’s claims without proper consideration of evidence.

Indeed, Plaintiff's Second Amended Complaint ("SAC") now contains detailed factual allegations supported by publicly available scientific evidence highlighting the role of human droplets as distinct and separate from virus particles, and highlighting the role of these two substances in causing damage and prompting the issuance of government ordinances. The allegations as amended are not "artful pleading", but in fact now reflect a good faith pleading of what Plaintiff believes to be the accurate physiologic and physical description as to what damage was actually at issue, and what damage-causing agents (human droplets, only some of which contain virus particles, vs. virus particles) truly required the civil ordinances. The droplets were targeted by the civil ordinances because governments believed that reducing exposure to the droplets would reduce the rate of virus transmission because some of the droplets, whether on surfaces or aerosolized, may contain the virus.

As such, this Court should deny State Farm's 12(b)(6) Motion. As plead by the SAC: 1) the presence of human droplets, which may contain virus particles, creates a Covered Cause of Loss; and 2) the Policy's Virus Exclusion Clause and other exclusion clauses either do not apply or should be analyzed according to California's concurrent causation doctrine. In summary, the Court should deny these 12(b)(6) motions and exercise prudence and restraint, allowing triers of facts to properly wrestle

1 with the important scientific and evidentiary questions present in the newly evolving area of COVID-19
 2 law.

3 **II. BACKGROUND**

4 **A. Brief Procedural History.**

5 Plaintiff Karen Trinh, DDS., Inc., (“Trinh”) filed the First Amended Complaint in the Superior
 6 Court of California, County of Santa Cruz, on May 22, 2020. State Farm removed the case to this Court
 7 on June 26, 2020. ECF No. 1. On August 24, 2020, per stipulation approved by this Court, Plaintiff filed
 8 its Second Amended Complaint to incorporate the latest scientific evidence relating to the distinction
 9 between human droplets and virus particles, a critical distinction which Plaintiff and its multidisciplinary
 10 team (which includes a physician/litigator who continues to work at the front line of the pandemic)
 11 believes was overlooked in some of the early motion practice across the country, and to also address
 12 recent opinions issued by other federal courts related to the COVID-19 business insurance coverage
 13 litigation. See Second Amended Complaint (“SAC”). On September 5th, 2020, State Farm filed a new
 14 Rule 12(b)(6) Motion to Dismiss (“Motion”) in response to Plaintiff’s Second Amended Complaint.
 15 ECF. No. 27.

16 **B. Statement of Facts and Specific Rebuttals.**

17 Relevant portions of the SAC are summarized here. State Farm’s Motion fails to properly
 18 characterize the material allegations.

19 **1. Plaintiff Trinh’s Background.**

20 As Plaintiff has pled in its SAC, Trinh is a dental practice located in Watsonville, California,
 21 owned by Dr. Karen Trinh, DDS. SAC at 4:22-26. Prior to the pandemic, Trinh employed around 10
 22 people and was serving around 50 to 60 patients per day, five days per week. *Id.* at 4:23-24.

23 **2. The Government Orders and Allegations of Physical Loss Due to Human Droplets.**

24 State Farm incorrectly alleges and concludes in its brief that Plaintiff is not entitled to Civil
 25 Authority Coverage because Plaintiff failed to allege damage to a nearby property. Motion at 17:13-14.
 26 This is incorrect. Plaintiff did in fact allege physical damage and risk of direct physical loss at its
 27 property and surrounding property, and that said damage reduced the ability to conduct their work.
 28 Specifically, Plaintiff alleged that, “the presence of possibly infected respiratory droplets, saliva, or

1 airborne particles, constitutes physical damage to Plaintiff's property or surrounding property." SAC at
 2 17:13-17.; see infra at 3:20-3:27; SAC at 12:5-10.

3 **3. Human Droplets, Which May or May Not Contain the Virus, Are the Material at Issue
 4 Causing Physical Damage.**

5 In fact, the SAC now makes a clear distinction between the virus and the human droplets, and
 6 that they are not the same matter. SAC at 12:3-20. First and foremost, the SAC expressly alleges that the
 7 droplets are not viruses, that a virus or other pathogen may travel in said droplets, and that human
 8 droplets may be the primary cause of the damage or losses in question. *Id.* at 12:21-13:18. The SAC
 9 expressly pleads that State Farm's all-risk policy exclusions are silent on droplets. *Id.* at 11:1-2. Second,
 10 the SAC clearly alleges that the particle size of a virus is approximately 0.125 μm , while the average
 11 human droplet size is 5 μm . *Id.* at 12:3-20. Proportionately, average human droplets are 40 times larger
 12 than a virus particle. *Id.* Third, the SAC alleges that multiple droplets can coalesce together and thus
 13 have their own physical presence, and the coalescence of multiple droplets may form a liquid layer that
 14 is visible to the naked eye. *Id.* Indeed, the SAC also alleges that some saliva droplets may be large
 15 enough to be seen by the naked eye. *Id.* As such, the SAC further alleges that droplets have actual
 16 physical presence, and they alter and damage surfaces where they are present. *Id.* Plaintiff's SAC is
 17 grounded by pleadings expressly relying on reasoned scientific evidence from credible sources,
 18 including the WHO, CDC, NIMH, PNAS, and other peer-reviewed scientific publication sources. *Id.* at
 Fn. 1-3, and also at 11:16-12:2, 13:1-21, 13:19-14:3.

19 Defendant suggests that the SAC is conclusory as to whether or not droplets cause damage. This
 20 is simply not the case. The SAC expressly pleads that droplets are contaminants that can land on a wide
 21 range of surfaces due to the accidental or fortuitous acts of sneezing, coughing, or mouth-to-hand to
 22 surface-to-nose-to-hand to surface contamination. SAC at 12:3-20. In addition, the SAC clearly
 23 identifies the droplets as rendering those surfaces as unsatisfactory by pleading that after such surfaces
 24 are contaminated, they have to be cleaned. *Id.* at 12:6-11. The SAC then clearly pleads that the daily
 25 damage caused by non-infectious droplets (as contaminants) caused them to become a focus of
 26 governmental pandemic measures: "When the pandemic hit, the human droplets became a focus of
 27 concern because they can possibly carry the virus." *Id.* at 12:8-9.

1 State Farm also seems to believe that only the human droplets that contain the virus (which as
 2 plead in 13:20-14:3 of the SAC may be the minority of droplets as there are conflicting views on the
 3 amount of virus present in droplets on surfaces) are hazardous and cause damage. Motion at 7:26-8:4.
 4 However, this misses or mischaracterizes the critical point that the SAC alleged, which is that droplets
 5 themselves have caused damage to surfaces such as doorknobs, handrails, utensils, tables, chairs, car
 6 seats, bus seats, benches etc. before the pandemic and were the subject of “daily cleaning protocol.”
 7 SAC at 12:3-8. The pandemic changed the scope of the impact of the droplets and the damage they
 8 could cause by linking them specifically to the *risk* of containing the COVID-19 virus. *Id.* at 12:3-20.
 9 Because of this concern, governments tried to control the spread of the virus by controlling exposure to
 10 droplets—it was no longer enough to have “daily cleaning protocols” but instead governments wished to
 11 restrict human passage to any areas where they might come in contact with human droplets.

12 **4. The Civil Ordinances Are Directed to Slow Down the Spread Of COVID-19 by
 13 Controlling the Spread of Human Droplets.**

14 As the SAC pleads, the County of Santa Cruz and State of California shut down or reduced
 15 business activity and issued stay-at-home orders. SAC at 14:20-24, 15:1-15. Consistent with the Order,
 16 the SAC alleges that the reason for the issuance of the orders was the need to reduce the spread and
 17 dissemination of the droplets that might contain the virus. *Id.* at 14:13-15. The Orders do not seek to
 18 eradicate the virus itself, but rather to slow its transmission. As such, they are targeting the physical
 19 presence of human droplets, not just the virus itself. *Id.* at 18:5-9. The SAC further alleges that the Santa
 20 Cruz and State of California Emergency Health Orders, in an unprecedented manner, required necessary
 21 measures to keep people at home and off the streets and out of areas of public gatherings, and thereby
 22 crippled the major source of revenue (in-person visits) for these Essential Businesses like Plaintiff. *Id.* at
 23 15:7-15. As a direct and proximate result of this Order, access to businesses like Trinh, including
 24 Essential Businesses like Trinh, have been specifically prohibited except for urgent care, emergency
 25 visits, and special medical needs. *Id.* at 15:10-12.

26 **III. LEGAL STANDARD FOR RULE 12(B)(6) ANALYSIS OF COVERAGE CLAIMS**

27 In analyzing Defendant’s Motion, the Court should not deviate from the overarching Rule
 28 12(b)(6) standards which call for viewing the pleadings in the light most favorable to Plaintiff and
 should take particular care to not dismiss these historic cases prematurely. As such, it is worth

1 reviewing first the relevant legal standards for Rule 12(b)(6) analysis and seminal California law,
 2 including guidance from the California Supreme Court, on interpretation of insurance contracts.

3 **A. The Court Should Accept All of the Allegations Made in the SAC as True, and Construe
 4 the Pleadings in the Light Most Favorable to Plaintiff; and Alternatively Grant Liberal
 5 Leave for Plaintiff to Amend the Complaint.**

6 Rule 12(b)(6) provides that a defendant may move to dismiss for “failure to state a claim upon
 7 which relief can be granted.” Fed. R. Civ. P. 12(b)(6). “To survive a motion to dismiss, a complaint
 8 must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its
 9 face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations and quotation marks omitted)
 10 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *Johnson v. Fed. Home Loan Mortg.
 Corp.*, 793 F.3d 1005, 1008 (9th Cir. 2015).

11 Further, for the purposes of this analysis, a court "accept[s] factual allegations in the complaint
 12 as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek
 13 v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). A court "presume[s] that
 14 general allegations embrace those specific facts that are necessary to support the claim." *Nat'l Org. for
 15 Women v. Scheidler*, 510 U.S. 249, 256 (1994). See *Scottsdale Ins. Co. v. Hudson Specialty Ins. Co.*, No.
 16 15-cv-02896-HSG, at *6 (N.D. Cal. Mar. 25, 2016).

17 Finally, in the event that the Court grants the motion to dismiss, the Court should allow broad
 18 discretion for Plaintiff to amend its complaint to cure any defects in the factual allegations. *Manzarek v.
 19 Marine*, 519 F.3d 1025, 1031 (9th Cir. 2008) (““Denial of leave to amend is reviewed for an abuse of
 20 discretion.” *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir. 2002). “Dismissal without leave to
 21 amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any
 22 amendment.” *Id.* (quoting *Polich v. Burlington N., Inc.*, 942 F.2d 1467, 1472 (9th Cir. 1991)).”)

23 **B. California Insurance Contract Interpretation Requires the Court to Interpret the Policy
 24 Language Broadly to Afford the Greatest Possible Protection to the Insured and to
 25 Interpret Exclusions Narrowly Against the Insurer.**

26 Interpretation of insurance contracts under California law requires this Court to employ general
 27 principles of contract interpretation. *Manzarek v. Marine*, 519 F.3d 1025, 1031 (9th Cir. 2008), citing
 28 *MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1212 (2003); *Safeco Ins. Co. of Am. v. Robert S.*, 26
 Cal.4th 758, 110 (2001). Further, under California law, the Court needs to give effect to the “mutual
 intention of the parties at the time the contract is formed. *Manzarek*, 519 F.3d at 1031; see Cal. Civ.

1 Code § 1636. California law requires that grants of coverage be interpreted broadly to afford the greatest
 2 possible protection to the insured, while exclusions are interpreted narrowly and against the insurer.
 3 *Shade Foods, Inc., v. Innovative Products Sales*, 78 Cal.App.4th 847, 867 (2000); *Reserve Ins. Co. v.*
 4 *Pisciotta*, 30 Cal.3d 800, 808 (1982). Thus, if a policy provision is capable of *two or more reasonable*
 5 *interpretations*, then it is considered ambiguous. *Stamm Theatres, Inc., v. Hartford Casualty Ins. Co.*, 93
 6 Cal.App.4th 531, 538 (2001). (emphasis added). Ambiguities must be resolved against an insurance
 7 company and in favor of the insured. *Reserve Ins. Co.*, 30 Cal.3d at 807-808.

8 To further illustrate this principle, the 9th Circuit Court in *Manzarek* held that an insurer must
 9 defend its insured “if the underlying complaint alleges the insured’s liability for damages *potentially*
 10 covered under the policy, or *if the complaint might be amended to give rise to a liability that would be*
 11 *covered under the policy.*” *Manzarek*, 539 F.3d at 1031, citing *Montrose Chem Corp. v. Superior Court*,
 12 861 P.2d 1153 (1993) (emphasis added). Indeed, the Court may even consider facts outside of the
 13 complaint, when they reveal a *possibility* that the claim may be covered by the policy (emphasis added).
 14 *Id.*

15 Defendant stated throughout their brief that under California law, unambiguous language
 16 controls. See e.g. Motion at 5:22-24, 12:19-22. However, under *Mackinnon*, the California Supreme
 17 Court has rejected this view and cautioned against the literal reading of a word when the dictionary
 18 meaning of the word is so broad that it renders the meaning absurd in view of the “ordinary and
 19 popular” sense of the word. *Mackinnon*, 73 P.3d at 1208.

20 IV. ARGUMENT

21 Plaintiff’s SAC alleges that the virus and human droplets are two separate physical materials that
 22 are remarkably different in size (i.e., the human droplets are on average 40 times larger than the typical
 23 virus particle) and effect, and that the policy is silent on droplets. SAC at 12:3-20, 11:1-2. As such, the
 24 direct physical loss requirement of the State Farm policy is satisfied either by the pleading on the human
 25 droplets or the virus or both, and to the extent there is a virus exclusion, it either does not apply to the
 26 droplet, or if it does, the virus is not the efficient proximate cause of the covered losses in question,
 27 including most notably the loss of revenue caused by the civil ordinances which targeted human droplets

1 by shutting down or limiting travel to businesses¹. Other purported exclusions such as the consequential
 2 loss and civil ordinance exclusion fail for the same reasons.

3 **A. Plaintiff's Allegations of Human Droplets Which May or May Not Contain Virus Particles
 4 as The Cause Of Damage Satisfies The "Accidental Direct Physical Loss" Requirement
 5 Which Must Be Broadly Interpreted to Afford Greatest Possible Protection to Plaintiff.**

6 In view of the Policy language and relevant case law, Plaintiff's allegations satisfy the direct
 7 physical loss or physical damage requirement for a Covered Cause of Loss.

8 **1. State Farm's Policy "Accidental Direct Physical Loss" Requirement as Plead.**

9 The State Farm Policy, as plead in the SAC, provides for coverage (under a section entitled
 10 "COVERAGE") as follows:

11 When a Limit Of Insurance is shown in the Declarations for that type of property
 12 as described under **Coverage A – Buildings, Coverage B – Business Personal
 13 Property**, or both, we will pay for accidental direct physical loss to that Covered
 14 Property at the premises described in the Declarations caused by any loss as
 15 described under **SECTION I — COVERED CAUSES OF LOSS**.

16 SAC at 6:10-14.

17 **2. The Legal Standard for Interpreting the Direct Physical Loss Requirement.**

18 The law governing and defining the aforementioned "accidental direct physical loss" is case
 19 specific and significantly more flexible and reasonable to the insured than State Farm acknowledges.
 20 California law requires every word in a policy be given a meaning. Cal. Civ. Code § 1641 ("[t]he whole
 21 of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each
 22 clause helping to interpret one other."); *Lyons v. Fire Ins. Exch.*, Cal.App.4th 880, 886 (2008) (insurance
 23 policy must be read so "that all words in a contract are to be given meaning").

24 Defendant argues that, in order to establish "a direct physical loss of" property, Plaintiff must
 25 allege losses that are intangible or incorporeal, and thereby preclude any claim against the property
 26 insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct,
 27 demonstrable, physical alteration of the property. Motion at 10:23-28, 11:1-2, citing *MRI Healthcare*

28 ¹ Plaintiff's Opposition Brief will address physical damage and physical loss first as they are predicate
 29 concepts for Covered Cause of Loss analysis, and the Virus Exclusion Clause and other exclusions
 30 cannot be analyzed without first establishing that a Covered Cause of Loss is triggered.

1 *Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779 (2010). However, this
 2 rigid, draconian interpretation has been rejected by California Courts as being too broad. Just recently,
 3 the Northern District of California rejected this interpretation of *MRI Healthcare Center* in *Mudpie*,
 4 *Inc. v. Travelers Casualty Insurance Company of America*, 20-cv-03213-JST, 2020 WL 5525171 (N.D.
 5 Cal. 2020) (“*Mudpie*”), citing to *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, No.
 6 2:17-cv-04908-AB-KSx), 2018 WL 3829767, at *3-4 (“*Total Intermodal*”). Both the *Mudpie* and
 7 *Intermodal* courts concluded that the phrase “direct physical loss **to**” in *MRI Healthcare Center* should
 8 be construed differently than “direct physical loss **of**” in order to properly apply the bedrock principle
 9 that every word be given a meaning. *Mudpie*, 2020 WL 5525171 at *4, quoting *Total Intermodal*, 2018
 10 WL 3829767, at *4. The Court in *Mudpie* reasoned that “to interpret ‘physical loss of’ as requiring
 11 ‘damage to’ would render meaningless the ‘or damage to’ portion of the same clause, thereby violating
 12 a black-letter canon of contract interpretation – that every word be given a meaning. *Mudpie*, 2020
 13 WL 5525171 at *3. Thus, the *Mudpie* Court, applying *Total Intermodal*, found that the language of this
 14 provision, alone, does not require a “physical alteration of the property” or “a physical change in
 15 condition of the property.” *Id.* Instead, the court in *Mudpie* held that there needs to be allegations of an
 16 intervening physical force which “made the premises uninhabitable or entirely unusable” in order to
 17 establish a “direct physical loss of property” under the policy. *See Mudpie* at p. 7-8; *see also Manpower*
 18 *Inc. v. Ins. Co. of the State of Pa.*, No. 08C0085, 2009 WL 3738099, at *6 (E.D. Wis. Nov. 3, 2009)
 19 (finding that the insured’s inability to access its property was a direct physical loss where the loss “was
 20 caused by a physical event—the [building] collapse—which created a physical barrier between the
 21 insured and its property”); *see also Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 5, 17 (W.Va.
 22 1998) (finding that “[l]osses covered by the policy, including those rendering the insured property
 23 unusable or uninhabitable, may exist in the absence of structural damage to the insured property” when
 24 a rockfall made plaintiffs’ homes uninhabitable); *see also Western Fire Insurance Co. v. First*
 25 *Presbyterian Church*, 165 Colo. 34, 437 P.2d 52, 54-55 (1968) (finding that the direct physical loss
 26 resulting from the ‘accumulation of gasoline around and under the church building,’ which made
 27 further use of the building highly dangerous when the insured, acting upon the orders of the fire
 28 department, closed the church building because gasoline had infiltrated the soil underneath it).

1 It is also not correct to say, axiomatically, that economic loss cannot constitute damage. Indeed,
 2 a more flexible and insured-protective approach to policy interpretation was adopted by the California
 3 Court of Appeal in *Thee Sombrero, Inc. v. Scottsdale Ins. Co.* when it noted that: “The correct principle,
 4 then is *not* that economic losses, by definition do not constitute property damage. [citations omitted] . . .
 5 Rather, the correct principle is that losses that are *exclusively* economic, without any accompanying
 6 physical damage or loss of use of tangible property, do not constitute property damage.” *Thee Sombrero,*
 7 *Inc. v. Scottsdale Ins. Co.*, 28 Cal.App.5th 729, 739 (Cal. Ct. App. 2018).

8 **3. Applying Applicable Law, Plaintiff Satisfies the Direct Physical Loss Requirements of
 the State Farm Policy.**

9 Consistent with the Northern District’s recent ruling in *Mudpie* and recent application of *Western*
 10 *Fire in Mudpie*, and consistent with *Total Intermodal, Manpower and Murray*, the SAC alleges physical
 11 damage from either the droplets (which may or may not contain the virus) and/or from the virus particles
 12 themselves. SAC at 11:16-12:2 (distinguishing between saliva droplets, respiratory droplets, and the
 13 virus itself, all of which may be in the air or on surfaces and causing damage to the premises and
 14 surrounding areas), 12:11-15 (droplets in air or on surfaces). The SAC pleads in great detail precisely
 15 how droplets, which may or may not contain virus particles, can land on, alter, and occupy physical
 16 surfaces, requiring cleaning protocols and removal. SAC at 12:3-23, 13:1-19, Fn. 2, (incorporated figure
 17 showing the various manners in which droplets and/or virus can damage surfaces and the surrounding
 18 air). The SAC expressly pleads that it is the presence of the human droplets and/or virus particles and
 19 the perception of the droplets’ harmful potential to *carry* the virus, even though the virus may be only in
 20 a small fraction of the droplets, that triggered the civil ordinances and/or caused damage at the
 21 scheduled premises or surrounding premises. SAC at 14:6-13, (tying droplet and virus damage to the
 22 orders limiting access to the scheduled premises), SAC at 15:7-12 (connecting the virus or droplet
 23 damage to physical accessibility), SAC at 15:16-17:23, (pleading in significant detail over several pages
 24 the risk of direct physical loss from asymptomatic individuals shedding droplets and/or virus particles,
 25 citing the WHO descriptions of the various modalities of damage through spread of droplets and
 26 resulting possible virus transmission (SAC at 16:5-23), and specifically articulating the role of human
 27 beings in carrying the droplets from location to location and why the ordinances needed to control their
 28 travel, ingress and egress from properties and regions (SAC at 17:22-23, 18:1-4)).

1 **4. State Farm’s Other Cited Authorities Are Inapposite, Distinguishable, and Should Not**
 2 **Be Relied Upon to Grant This Premature Rule 12(b)(6) Motion.**

3 Defendant argues in its Motion that simply because “human droplets” make surfaces “essentially
 4 dirty,” this is not a physical loss. Motion at 14:19-26. However, each of the cases cited by Defendant is
 5 distinguishable. For example, in *Mama Jo’s, Inc. v. Sparta Insurance Co.*, No 18-12887, 2020 WL
 6 4782369, at *1 (11th Cir. Aug. 18, 2020), the Court granted a motion to dismiss finding that dust and
 7 debris from nearby construction work did not constitute physical damage to scheduled premises. In view
 8 of the recent *Mudpie* decision, the Northern District would not find *Mama Jo’s* persuasive as the
 9 Northern District has now stated that virus particles, transmitted through droplets, are “no less a physical
 10 force than the accumulation of gasoline in *Western Fire* or the ammonia release [which] physically
 11 transformed the air in [another case].” *Mudpie*, 2020 WL 5525171 at *5, FN 7. Defendant’s citations to
 12 *Universal Image Productions, Inc. v. Federal Insurance Co.*, 475 F. App’x 569, 573 (6th Cir. 2012)
 13 (finding that mold and bacteria in a building did not amount to “direct physical loss”) and *Mastellone v.*
 14 *Lightning Rod Mutual Insurance Co.*, 884 N.E.2d 1130, 1144 (Ohio App. 2008) (finding that mold
 15 staining did not constitute physical damage) are not dispositive here in light of the Northern District’s
 16 recent analysis in *Mudpie*. Besides the fact that *Mudpie* now serves to clarify the Northern District’s
 17 view on appropriate pleading of direct physical loss damage, it is also worth noting that the purported
 18 damage from mold, bacteria, or mold staining in *Universal* and *Mastellone* did not result in actual loss
 19 of use, whereas in this case, the damage from virus particles and droplets resulted in actual loss of access
 20 to the scheduled premises and surrounding areas as plead in the SAC. See SAC at 17:1-21; see *infra* at
 Section IV(A-5).

21 Finally, Defendant argues that cost for cleaning is not covered by the policy when they argued
 22 that cleaning is not contemplated under the policy. Motion at 14:16-18. However, California courts have
 23 ruled differently. For example, governmental claims against an insured for pollution clean-up and other
 24 “response” costs under CERCLA are “damages” within the meaning of the policy, whether the claim is
 25 for remedial costs (paying for clean-up) or mitigation costs (preventing further injury once damage has
 26 already occurred). See *AIU Ins. Co. v. Sup. Ct. (FMC Corp)*, 51 C3d 807, 824-825 (1990). At the very
 27 least, this is a triable question of fact and law that cannot be disposed of at the 12(b)(6) pleading stage.

28 **5. Physical Damage Under the State Farm Policy May Also Be Satisfied by Loss of Use.**

 The State Farm Policy provides the following definition for “Property Damage”:

1 **a. Physical injury to tangible property, including all resulting loss of use**
 2 [emphasis added] of that property. All such loss of use shall be deemed to
 3 occur at the time of the physical injury that caused it; or
 4 **b. Loss of use of tangible property that is not physically injured or**
 5 **destroyed, provided such loss of use is caused by physical injury to or**
 6 **destruction of other tangible property** [emphasis added]. All such loss
 7 of use shall be deemed to occur at the time of the “occurrence” that caused
 8 it.

9 SAC, Exhibit A at p. 49.

10 It is well established California law that insurance contracts “must be construed in the context of
 11 that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous
 12 in the abstract”. See *Bank of the W. v. Superior Court*, 2 Cal. 4th 1254, 1265, 10 Cal.Rptr.2d 538, 833
 13 P.2d 545 (1992). As such, the previously cited definition of Covered Cause of Loss (see SAC at 6:10-
 14 14) and the discussion of direct physical loss or physical damage must be informed by this definition of
 15 property damage which permits “loss of use of tangible property that is not physically injured or
 16 destroyed.” Applicable case law supports this analysis as well. See e.g. *Borg v. Transamerica Ins. Co.*,
 17 47 Cal. App. 4th 448, 456-57, 54 Cal. Rptr. 2d 811, 816 (1996) (where the Court holds that loss of use
 18 may include loss of use of tangible property not otherwise physically damaged); see also *Hendrickson v.*
 19 *Zurich American Ins. Co. of Ill.*, 72 Cal. App. 4th 1084, 1090-1091 (1999) (where Court followed *Borg*
 20 in finding damage from loss of use of strawberry fields without actual physical damage); see also *Thee*
 21 *Sombrero, Inc. v. Scottsdale Ins. Co.*, 28 Cal. App. 5th 729, 736-738 (2018) (where the Court rejected
 22 the insurer’s contention that an amendment to a Conditional Use Permit (CUP) was not a loss of use of
 23 tangible property as a result of a shooting in a nightclub and the Court observed, “If your leased
 24 apartment was rendered uninhabitable by some noxious stench, you would conclude that you had lost
 25 the use of tangible property; and if a lawyer said no, actually you had merely lost the use of your
 26 intangible lease, you would goggle in disbelief.”)

27 Applying *Borg*, *Hendrickson*, *Thee Sombrero*, and other similar cases in California and other
 28 jurisdictions, this Court may also find that Plaintiff satisfies the physical damage requirement by virtue
 29 of the pleadings which state clearly that as a result of the concern for droplets and virus particles
 30 rendering physical surfaces and enclosed spaces as sites for virus transmission, Plaintiff suffered the

1 same kind of physical damage or property damage by loss of use of its own premises. SAC at 14:14-
 2 18:9.

3 Therefore, because the SAC adequately pleads risk of direct physical loss sufficiently to trigger
 4 coverage under the State Farm policy and with sufficient particularity to satisfy Rule 12(b)(6) and
 5 California insurance law standards, the Court should deny Defendant's motion to dismiss on grounds
 6 that physical damage or loss was not satisfactorily plead.

7 **B. The Virus Exclusion Does Not Apply to Human Droplets, and to the Extent It Does Apply,
 8 It Must Be Construed Narrowly Against State Farm.**

9 State Farm argues that the Virus Exclusion Clause unambiguously bars the entirety of Plaintiff's
 10 claims. Motion at 5:3-11. The relevant portion of the Virus Exclusion Clause is plead in the SAC at
 11 10:2-26. As alleged in the SAC, the policy does not define, address, or exclude losses or physical
 12 damage or alteration related to human droplets (either respiratory or saliva, both large and small). *Id.* at
 13 11:1-2. Under California law, the Virus Exclusion Clause needs to be interpreted narrowly and against
 14 the insurer. *Manzarek*, 519 F.3d at 1032, *supra*. Against this backdrop, there are several possible
 15 interpretative scenarios based on how narrowly the Court construes the reading of the Virus Exclusion
 16 Clause, all of which favor coverage and all of which do not favor dismissal at a pleading stage.

17 **1. Interpretation I: The Virus Exclusion Does Not Apply to Human Droplets and Therefore Is
 18 Not Applicable to the Facts Alleged in the SAC.**

19 As discussed above, California law requires any exclusion language to be construed narrowly
 20 against the insurer. *Manzarek*, 519 F.3d. at 1032, *supra*. Thus, if the Court takes this approach to
 21 narrowly interpret the Clause, where the human droplet is the Covered Cause of Loss, it would then
 22 follow that the Virus Exclusion Clause does not apply because as alleged in the SAC, the Virus
 23 Exclusion Clause does not define, address, or exclude losses or physical damage, or alteration related to
 24 saliva and/or respiratory droplets. SAC at 10:2-26, 11:1-2. The SAC in fact pleads in significant detail
 25 the distinct and primary causative role of droplets in causing the damage in question. *Id.* at 11:16-24,
 26 12:1-20, 17:1-21. This reading is consistent with the plain and ordinary reading of the clause under
 27 California Law without further need of interpretation. *Manzarek*, 519 F.3d at 1031.

1 2. **Interpretation II: Even If the Virus Exclusion Applies Indirectly to Human Droplets That**
 2 **Contain the Virus, It Still Does not Apply to Human Droplets That Do Not Contain the**
 3 **Virus but Are Still a Covered Cause of Loss.**

4 State Farm argues in its brief that the Virus Exclusion Clause unambiguously bars coverage for
 5 all of Plaintiff's claims against them because a Florida District Court dismissed a COVID-19 business
 6 interruption case because the "the plain language" of the virus exclusion barred coverage for "loss or
 7 damage" caused 'directly or indirectly' by '[a]ny virus, bacterium or other microorganism that induces
 8 or capable of inducing physical distress, illness or disease.'" Motion at 6:11-17, quoting *Martinez v.*
 9 *Allied Ins. Co. of Am.*, No. 2:20-cv-00401-JLB-NPM (M.D. Fla., Sept. 2, 2020). Once again, this
 10 interpretation needs to be construed narrowly and against State Farm. *Manzarek*, 519 F.3d at 1032,
 11 supra. Appropriate analysis of the Virus Exclusion Clause requires a separate analysis between "directly
 12 caused by a virus," and "indirectly caused by a virus" in the context of the facts alleged in the SAC. In
 13 other words, the Virus Exclusion Clause needs to be construed in the context of the role of human
 14 droplets as expressly alleged in the SAC.

15 As to the "directly caused by a virus" clause, the SAC alleges that the presence of human
 16 droplets, not the virus, may constitute the direct physical harm, physical damage, and physical loss to
 17 Plaintiff's property or surrounding property. SAC at 11:16-24, 12:1-20, 17:1-21. The SAC specifically
 18 points to the physical size and physiologic difference between the droplets and the virus. *Id.* at 12:11-20.
 19 Furthermore, the SAC also alleges that the droplets are not viruses, but a virus or a pathogen can
 20 sometimes travel in said droplets. *Id.* at 12:1-2. The SAC also alleges that the physical dimension of the
 21 average droplet is approximately 40 times the size of the average virus particle. *Id.* at 12:11-20. Thus,
 22 the SAC has alleged that the droplets are entirely separate material from the virus. Construing the clause
 23 narrowly and against State Farm, the clause "directly caused by a virus" cannot apply when the SAC
 24 alleges human droplets as the Covered Cause of Loss because the SAC has alleged sufficient facts to
 25 distinguish the virus and the human droplets. As discussed previously, because the Virus Exclusion
 26 Clause is silent on human droplets and the clause needs to be construed narrowly and against the insurer,
 27 then the clause "directly caused by a virus" cannot apply when the SAC alleges physical damage or loss
 28 caused directly by the human droplets. ***Which particle (virus or droplet) caused the loss in these
 unprecedented cases should not be adjudicated at the pleading stage but should be debated by experts
 before a trier of fact.***

With respect to the “indirectly caused by a virus” clause, State Farm attempts to argue that the human droplets that contain the virus may be excluded under the literal reading of the language. However, this reading does not account for human droplets that do not contain the virus. As alleged in the SAC, the droplets are not viruses, but significant viruses and other pathogens can sometimes (not always) travel in said droplets. SAC at 11:16-24, 12:1-2. The SAC also specifically alleges that the human droplets became a focus of concern because they can possibly carry the virus. SAC at 11:16-24, 12:1-20. As such, the Virus Exclusion Clause still fails to address the human droplets that do not contain the virus but still cause physical loss or damage when said droplets are present on the surface of Plaintiff’s property and/or surrounding premises. These droplets, as plead, still cause damage because there is no way to differentiate droplets from infected people (asymptomatic and pre-symptomatic) from the vast majority of droplets from non-infected people which do not contain the virus. SAC at 15:16-24, 16:1-4. Construing the Clause narrowly and against State Farm, the Clause would not apply to this larger class of droplets which create loss but do not carry the virus.

3. Interpretation III: Wholesale Application of the Virus Exclusion Is Inconsistent With the Facts of the SAC as Plead, and Moreover California Requires Concurrent Causation Analysis Which Cannot Be Resolved at the Pleading Stage.

Defendant State Farm made an incorrect conclusory argument that COVID-19 is the efficient proximate cause of Plaintiff’s alleged loss, and therefore all losses due to COVID-19 fall squarely within the Virus Exclusion Clause. Motion at 8:13-16. Under this argument, any losses, directly or indirectly caused by the COVID-19 virus, are excluded by the virus exclusion. *Id.* at 9: 2-3. Even before addressing efficient proximate cause analysis, which is discussed in the next section, there are numerous fundamental problems with this interpretation which make this interpretation unreasonable and overbroad in a manner squarely disfavored by both Rule 12(b)(6) standards of review and California law.

First, this “COVID-19 as the sole efficient proximate cause” interpretation fails to account for the SAC allegations that only some droplets have the virus but *all* droplets damage surfaces by occupying space with physical altering (and indeed contaminating) properties or at least pose a risk of damaging surfaces. SAC at 13:20-22, 14:1-3, 17:5-23, 18:1-9. Surprisingly, State Farm has not considered or addressed the scientific facts unique to human droplets as alleged in the SAC. Motion at 7:26-28, 8:1-4, Fn. 3. Taking the facts alleged as true, it is implausible for the virus to exist

1 independently outside of the human droplet and, as plead in the SAC, viruses do not independently
 2 cause the physical damage or physical loss to the property.² SAC at 14:7-18:9.

3 Second, State Farm's interpretation runs afoul of standards requiring the narrowest possible
 4 interpretation of the Virus Exclusion Clause against State Farm. State Farm's interpretation would mean
 5 that if the human droplets, as alleged in the SAC, fall somewhere (indeed anywhere) in the chain of
 6 causation that stems from the COVID-19 pandemic, then the Virus Exclusion Clause applies. In the
 7 context of Plaintiff's SAC, this interpretation is simply inapposite. While State Farm's interpretation
 8 may be consistent in a tenuous and theoretical sense with the literal and plain meaning of "indirectly
 9 caused" by the virus, *MacKinnon*, *supra*, has expressly warned about literal interpretations used to
 10 preclude coverage and/or prematurely dismiss insured complaints.

11 **4. Even if the Virus Exclusion Applies, There Is a Clearly Competing Covered Loss (in the
 12 Form of Droplets) Which Must Be Analyzed Under California's Concurrent Causation
 13 Doctrine Which Cannot Be Meaningfully or Fairly Done at the Pleading Stage.**

14 Under Cal. Ins. Code § 532, "[i]f a peril is specially excepted in a contract of insurance and there
 15 is a loss which would not have occurred but for such peril, such loss is thereby excepted even though the
 16 immediate cause of the loss was a peril which was not excepted." As such, efficient proximate cause
 17 analysis must be applied when a non-excluded peril and an excluded peril combine to cause a loss. In
 18 such cases, so long as the non-excluded peril is the "Efficient Proximate Cause," there is coverage for
 19 the loss. This is so even though an excluded peril concurrently contributed to producing the loss. The
 20 "Efficient Proximate Cause" is also referred to as the "Predominate Cause." Under *Sabella v. Wisler*, 59
 21 Cal.2d 21, 31-32 (1963) and as further clarified in *Garvey v. State Farm*, 48 Cal.3d 395 (1989), the
 22 "Predominant Cause" is not automatically the "triggering" cause: "[I]n determining whether a loss is
 23 within an exception in a policy, where there is a concurrence of different causes, *the efficient cause – the
 24 one that sets others in motion – is the cause to which the loss is to be attributed*, though other causes
 25

26 ² In fact, this incorrect assumption (which ignores the role of human droplets as pled in the SAC)
 27 has been the foundation of the recent string of case decisions granting various insurers' motion to
 28 dismiss. Motion at 12:7-15:17; Cf. SAC at 11:16-13:18, 17:1-21.

1 may follow it, and operate more immediately in producing the disaster.” *Sabella*, 59 Cal.2d 21 at 31-32.
 2 (Emphasis added.) The *Garvey* Court noted that “*Sabella* . . . sets forth a workable rule of coverage that
 3 provides a fair result within the reasonable expectations of both the insured and the insurer whenever
 4 there exists a causal or dependent relationship between covered and excluded perils.” *Garvey*, 48 Cal.3d
 5 395 at 404. Where the policy provides coverage for a specified peril, if the specified peril is the
 6 predominant cause of the loss, the loss is covered regardless of whether there were excluded
 7 contributing causes. *Vardanyan v. AMCO Ins. Co.*, 243 CA4th 779, 792 (2015).

8 Further, under California law, a virus exclusion clause that excludes coverage where the
 9 excluded peril “contributes in any way” to the loss may be deemed illusory because it “suggests [that]
 10 the insurer could deny coverage for a loss caused by 1% of an excluded peril and 99% by a covered
 11 peril.” *Julian v. Hartford Underwriter Ins. Co.*, 35 C4th 747, 759 (2005). In other words, denial of
 12 coverage where the excluded peril is only a remote cause of a loss caused by a combination of covered
 13 and excluded perils would circumvent the efficient proximate cause doctrine and thus violate Cal. Ins.
 14 Code §§ 530 and 532. *Id. at 759.*

15 Applying *Sabella*, *Garvey*, *Julian* and the progeny of cases which have historically applied
 16 California’s statutorily-required concurrent causation analysis, the SAC alleges that human droplets are
 17 the main source of the loss, particularly when cities and counties issued the emergency stay-at-home
 18 orders to reduce contact with the human droplets to prevent asymptomatic transmissions and pre-
 19 symptomatic transmissions even with debate as to how many virus particles were in fact present in the
 20 much larger, more substantial droplets. SAC at 12:3-18:9. Further, the SAC also alleges that with or
 21 without the virus particles, the human droplets, which are 40 times as large as a virus particle, have
 22 physically changed and physically damaged Plaintiff’s property and surrounding property. *Id. at 17:13-*
 23 *18:9.* Accepting the allegations in the SAC as true as plead, the human droplets are the efficient
 24 proximate cause of the loss and not the virus, and the Court must accept that as true and allow discovery
 25 to proceed and must allow for a trier of fact to ultimately adjudicate on this important question.

26 **5. The Virus Exclusion Clause Is Ambiguous Under California Law When There Are at**
27 Least Two Reasonable Interpretations of the Clause Which Creates a Triable Question
28 of Fact Not Resolvable at the Pleading Stage.

Given that there are two or more possible reasonable interpretations of the Virus Exclusion
 Clause depending on how narrowly the Virus Exclusion Clause should be interpreted against the insurer,

1 the Virus Exclusion Clause is ambiguous under California law. *Stamm Theatres, Inc.*, 93 Cal.App.4th at
 2 538, *see supra*. If a policy provision is capable of two or more reasonable interpretations, then it is
 3 considered ambiguous. *Id.* Ambiguities must be resolved against an insurance company and in favor of
 4 the insured. *Reserve Ins. Co.*, 30 Cal.3d. at 807-808, *supra*.

5 **6. Recent Lower Court Decisions on Other COVID-19 Litigation Are Distinguishable and
 6 Do Not Address Human Droplets as the Covered Cause of Loss.**

7 State Farm, in its brief, cites to several COVID-19 insurance case decisions issued in the past
 8 several weeks. At a high level, none of those cases apply here because none of the cases alleged physical
 9 loss or damage caused by human droplets.

10 Contrary to State Farm's characterization that there is no difference between the virus and
 11 droplets, Plaintiff's SAC is supported by findings of the WHO, the CDC, NIMH, and other peer-
 12 reviewed health research institutes like Proceedings of the National Academy of Sciences of the United
 13 States of America ("PNAS") which allege the physiological and physical distinctions between the virus
 14 and droplet. SAC at 11:16-24, 12:1-23, 13:1-22, 14:1-3.³ Most importantly, the SAC allegations that
 15 droplets are different than the virus directly tracks almost exactly the recommended pleading which the
 16 Northern District in *Mudpie* has indicated would be sufficient to establish physical damage in order to
 17 survive a Rule 12(b)(6) motion, except that Plaintiff took it one step further to clarify the physical and
 18 causative distinctions between droplets and the virus particles—which distinctions are key to the fate of
 19 the exclusion causes, invoke California's statutorily required concurrent causation doctrine, and should
 20 be preserved for adjudication of evidence. Plaintiff's SAC is very distinguishable than recent California
 21 decision in *10E, LLC. v. Travelers Indemnity Co. of Connecticut*, 2:20-cv-04418-SVW-AS, 2020 WL
 22

23
 24 ³ As of the September 21, 2020 (the date of this brief's finalization), on the same CDC website cited in
 25 the SAC at Footnote 3 of the SAC, the CDC issued updated recommendations (reported widely on CNN
 26 as of this morning) in which it states that it is "currently updating its recommendations regarding
 27 airborne transmission", that "we are still learning how the virus spreads" and where it recognizes the
 28 distinct and independent role of droplets. See [https://www.cdc.gov/coronavirus/2019-ncov/prevent-
 getting-sick/how-covid-spreads.html](https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html); cf. SAC at Footnote 3.

5095587 (C. D. Cal. Sept. 2, 2020), where the plaintiff in that case did not plead any physical damage or physical loss to their restaurant. The distinction between virus particles and droplets lies at the heart of a nascent but evolving COVID-19 jurisprudence which the Northern District has now said is “very much in development.” *Mudpie*, 2020 WL 5525171 at *8.

As such, the litany of cases cited by State Farm are all distinguishable and ultimately inapposite:

- i. Unlike plaintiffs who attempted to allege that the virus exclusion did not apply because the virus was not present in their properties (see e.g. *Diesel Barbershop, LLC. v. State Farm Lloyds*, 2020 WL 4724305, at *5 (W.D. Tex. Aug 13, 2020) (Motion at 1, 7, 12); *Gavrilides Mgmt. Co. v. Michigan Ins. Co.*, 20-258-CB-C30 (Mich. Cir. Ct., Ingham City) (Motion at 6, 13)), Plaintiff pleads that direct physical damage occurred as a covered loss and specifically identifies human droplets and/or droplets with virus particles as the primary cause of the damage. SAC at 11:16-13:18, 17:1-21.
- ii. Unlike in *Rose's I, LLC. v. Erie Ins. Exch.*, No 2020 CA 002424B (D.C. Super Ct., Aug. 6, 2020) (Motion at 13), where the plaintiff alleged that a governmental edict, standing alone, constitutes a direct physical loss under an insurance policy, Plaintiff pleads that direct physical damage occurred as a covered loss and specifically identifies human droplets and/or droplets with virus particles as the primary cause of the damage. SAC at 11:16-13:18, 17:1-21.
- iii. Unlike in *Social Life Magazine, Inc. v. Sentinel Ins. Co.*, 1:20-cv-3311 (S.D.N.Y., May 14, 2020) (Motion at 13), where the plaintiff alleged the loss of use of their printing equipment as the cause of loss that triggers coverage, Plaintiff alleges that direct physical damage occurred as a covered loss and specifically identifies human droplets and/or droplets with virus particles as the primary cause of the damage. SAC at 11:16-13:18, 17:1-21.
- iv. Similar to *Diesel*, *Gavrilides*, and *Social Life Magazine*, the plaintiff in *Turek Enterprises, Inc. v. State Farm Mutual Automobile Insurance Co.*, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020) failed to allege accidental direct physical loss or damage to the property and instead plead that the government order was the sole cause of its losses. Motion at 1, 2, 12, and 16. This is completely distinguishable from Plaintiff's allegations of direct physical damage caused by human droplets and/or droplets with virus particles. SAC at 11:16-13:18, 17:1-21.

1 It is remarkable that all the decisions cited above by State Farm came from jurisdictions that
 2 recognize and enforce Anti-Concurrent Causation (ACC) clauses (clauses which allow end-runs around
 3 concurrent causation analysis), whereas California is one of the estimated four states that expressly
 4 prohibits ACC clauses and codifies such a prohibition in Cal. Ins. Code § 533. See also *Vardanyan*,
 5 Cal.App.4th at 786. As such, when viewing the litany of preliminary rulings in other states on this novel
 6 area of COVID-19 law, this Court should consider the cited decisions carefully, especially given that (1)
 7 other decisions arose in states that are obviously and historically more favorable to insurers where they
 8 also permit ACC clauses, and (2) California has a long history of upholding protection for insureds, as
 9 codified in Cal. Ins. Code §§ 532-533. (In one notable exception to the small, early string of Defendant
 10 favorable decisions cited by State Farm, the district court in Western District of Missouri denied the
 11 insurance defendant's motion to dismiss on physical damage grounds. See *Studio 417, Inc. v. Cincinnati*
 12 *Insurance Co.*, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020). Similar to *Studio 417*, in this case,
 13 Plaintiff pleads that damage occurred as a covered loss and specifically identifies human droplets as the
 14 primary cause of the damage. SAC at 11:16-13:18, 17:1-21. The *Mudpie* decision, discussed extensively
 15 above, went well beyond *Studio 417*, and clarified the Northern District's view of the requisite
 16 ingredients (all present in Plaintiff's SAC) to successfully plead physical damage for these cases.)

17 **C. Plaintiff Has Sufficiently Alleged Facts That Trigger Civil Authority Coverage by Alleging
 Human Droplets, With or Without Virus Particles, as a Covered Cause of Loss.**

18 State Farm, in its brief, incorrectly surmised that the SAC tried to trigger the Civil Authority
 19 clause independently and shoehorn the language of the Civil Authority coverage to the Direct Physical
 20 Loss or Physical Damage requirement. Motion at 17:4-17. This is incorrect for the reasons discussed
 21 below. The language of the Civil Authority is as follows:

22 **4. Civil Authority**

23 **a. When a Covered Cause Of Loss causes damage to property other than**
 24 **property at the described premises, we will pay for the actual “Loss Of Income”**
 25 **you sustain and necessary “Extra Expense” caused by action of civil authority**
 26 **that prohibits access to the described premises, provided that both of the**
 27 **following apply:**

28 **(1) Access to the area immediately surrounding the damaged property is**
 29 **prohibited by civil authority as a result of the damage, and the described**
 30 **premises are within that area but are not more than one mile from the damaged**
 31 **property; and**

(2) The action of civil authority is taken in response to dangerous physical
 32 **conditions resulting from the damage or continuation of the Covered Cause Of**

1 Loss that caused the damage, or the action is taken to enable a civil authority to
 2 have unimpeded access to the damaged property.

2 SAC at 9:3-16.

3 State Farm has argued that Plaintiff has not alleged sufficient facts to trigger Civil Authority
 4 coverage. Motion at 16:20-23, 17:1-3. This is simply incorrect. Reading the plain language of the Policy,
 5 Civil Authority coverage extends coverage to a specific situation that would not otherwise be covered
 6 under the Policy. SAC at 9:4-26. The “extended” coverage applies when access to the premises insured
 7 by the Policy is specifically prohibited by order of a civil authority as the direct result of a Covered
 8 Cause of Loss to property in the immediate surrounding area of the insured premises. *Id.*

9 Applying that language to the allegations in the SAC, Plaintiff has satisfied both requirements.
 10 First, the SAC alleges direct physical loss or physical damage due to human droplets at the surrounding
 11 property, which as discussed previously, is a covered cause of loss. SAC at 11:16-13:18, 17:1-21; see
 12 *supra* at Section IV-A. Second, the language of the Santa Cruz County ordinance expressly prohibits
 13 access to Trinh’s dental clinic, and the SAC pleads damage at the scheduled premises. SAC at 14:6-
 14 15:15, 17:5-12. Assuming these two factual allegations to be true, the SAC has alleged sufficient facts to
 15 show coverage under the Civil Authority clause. (*Prime Alliance Group, Ltd. v. Hartford Fire Ins. Co.*,
 16 No. 06-22535, 2007 WL 9703576 (S.D. Fla. Oct. 19, 2007) is a distinguishable, non-binding Florida
 17 case where claimant attempted to construe the civil authority by itself as the Covered Cause of Loss, and
 18 naturally, the court in *Prime Alliance* had to deny that construction.)

19 State Farm argued that even if the Civil Authority Clause somehow applies, Plaintiff cannot
 20 show that the Government Order fully prohibited access to Plaintiff’s clinic. Motion at 19:14-22. To the
 21 extent that State Farm alleges that the Santa Cruz Order does not completely shut down access to
 22 Plaintiff’s clinic when Plaintiff is a necessary business, the language of the policy only says “action of
 23 civil authority that prohibits access to the described premises,” but the policy does not state *complete*
 24 prohibition of access to the premise. SAC at 9:6-8. Plaintiff has alleged that given the concern over the
 25 role of human droplets in COVID-19 transmission, State and Local authority ordinances were issued
 26 suspending normal, in-person, physical visitation of business properties (including clinics like
 27 Plaintiff’s) to curb the threat of further spread and transmission of COVID-19. SAC at 18:5-9. State
 28 Farm’s argument that access is not prohibited when there is no physical barricade to prevent people from

1 entering the clinic is irrelevant. Motion at 19:11-15. No such requirement exists in the Civil Authority
 2 language provided in the Policy. SAC at 9:4-25.

3 State Farm also argued that the Government Orders were preventative in nature in order to “slow
 4 the spread of [the] COVID-19 virus,” and analogized the civil authority order to government orders in
 5 pre-hurricane evacuations or pre-terrorist attacks. Motion at 18:27-28, 19:1-3. However, these non-
 6 California cases are inapposite because the State and County Public Orders were issued in response to
 7 the actual physical presence of droplets and droplets which may contain virus particles. SAC at 17:22-
 8 23, 18:1-4.

9 **D. The Policy’s “Loss of Income,” “Extended Loss of Income,” and “Extra Expense”
 10 Coverages Are Applicable Because the Virus Exclusion Clause Does Not Apply.**

11 State Farm’s primary argument is that these policy coverages do not apply because Plaintiff has
 12 not sufficiently alleged “accidental direct physical loss to the property.” Motion at 19:24-28, 20:1-2.
 13 However, as discussed above at length in Sections IV.A.1 through IV.A.4, Plaintiff has alleged more
 14 than sufficient facts to satisfy the requirements of the “accidental direct physical loss to the property”
 under California Law. See Sections IV.A.1 through IV.A.4, *supra*.

15 State Farm’s second argument rests on their virus exclusion clause, stating that a virus is not a
 16 “Covered Cause of Loss.” Motion at 20:8-9. However, as thoroughly discussed above in Section IV.B.1
 17 through Section IV.B.5, the virus exclusion, as presented in the policy language, does not apply for the
 18 reasons already discussed above. See Sections IV.B.1-4, *supra*.

19 **E. Additional Policy Exclusions Do Not Bar Plaintiff’s Claims.**

20 State Farm argues that coverage is also barred by the “Ordinance or Law,” the “Acts of
 21 Decisions,” and the “Consequential Loss” Exclusions. Motion at 20:25-27. These Exclusions do not
 22 justify a Rule 12(b)(6) dismissal for reasons similar to those discussed already in connection with the
 23 Virus Exclusion Clause.

24 **1. Ordinance or Law Exclusion Is Not a Basis for 12(b)(6) Dismissal.**

25 The first section of this exclusion reveals its intent: “(1) The enforcement of any ordinance or
 26 law: (a) Regulating the construction, use or repair of any property[;]” As discussed above, California
 27 law requires every word in a policy be given a meaning. Cal. Civ. Code § 1641 (“[t]he whole of a
 28 contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause

1 helping to interpret one other.”); *Lyons*, Cal.App.4th at 886 (insurance policy must be read so “that all
2 words in a contract are to be given meaning.”)

3 Reading the clause together with the word construction, the exclusion on its plain reading seems
4 to be directed to ordinances and laws that regulate the construction, use, or repair of any property. The
5 State and County Health orders, on their face, do not regulate the construction, use, or repair of any
6 property. Rather, they are written for the specific intent to order all individuals to stay at home to
7 prevent further transmission of COVID-19 through human droplets. SAC at 18:5-9. Applying *Manzarek*,
8 *MacKinnon*, and considering ambiguity in light of *Reserve Ins. Co.* (i.e. resolving ambiguities in favor
9 of the insured), the Court cannot possibly at the pleading stage use the Ordinance or Law Exclusion to
10 bar coverage and the complaint. The Ordinance or Law Exclusion is ambiguous at best because if State
11 Farm’s interpretation is correct, it is inconsistent with the Civil Authority coverage, and at worst,
12 applying the narrowest possible interpretation, it literally has no application to the pandemic ordinances.
13 Cf. SAC at 18:5-9 with SAC at Ex. A at A-18.

14 **2. Acts or Decisions Exclusion Is Not a Basis for 12(b)(6) Dismissal.**

15 The language of the “Acts or Decisions” exclusion attempts to exclude coverage for, “Conduct,
16 acts or decisions, including the failure to act or decide, of any person, group, organization or
17 governmental body whether intentional, wrongful, negligent, or without fault.” SAC, Exhibit A at A-19.
18 State Farm argues that the State and County Government Order constitutes an act that somehow triggers
19 this exclusion. Motion at 21:8-25. First, State Farm’s argument completely ignores the allegations of the
20 human droplets as the Covered Cause of Loss. SAC at 17:1-21. The human droplets is simply not
21 applicable to exclusion language.

22 Moreover, State Farm fails to apply *Manzarek*, *MacKinnon*, or concurrent causation, all of which
23 would render the exclusion limited or inapplicable to the damage caused by the human droplets
24 prompting the COVID-19 ordinances. The language is indeed exemplifying the problem of overbroad
25 and ambiguous language expressed by *Manzarek* and *MacKinnon*. The literal interpretation would
26 exclude any possible act of any person anywhere for any reason. The clause should be considered
27 illusory and disregarded on its face. See *Julian*, 35 C4th at 759.

1 **3. The Consequential Loss Exclusion Is Not a Basis for 12(b)(6) Dismissal.**

2 The policy language for “Consequential Loss” simply states, “Delay, loss of use or loss of
 3 market.” Exhibit A at A-18. First, the clause is so ambiguous that it does not even make any sense when
 4 read in the context of the human droplets as the Covered Cause of Loss. State Farm’s reading would run
 5 afoul of *Manzarek* for being overbroad, and run afoul of *MacKinnon* for sheer absurdity.

6 Second, State Farm tried to apply the clause where an insured alleged “its damages were caused
 7 by its inability to access” its property and “did not contend that its [property] had been physically
 8 damaged in any way [citations omitted.] Motion at 22:1-4. This argument is simply inapposite when
 9 Plaintiff already extensively pled the physical damage associated with human droplets in its premises
 10 and surrounding premises. SAC at 17:1-21.

11 **F. Plaintiff Has Sufficiently Pled Factual Allegations for Each of Its Causes of Action to
 12 Survive the 12(b)(6) Motion.**

13 Defendant’s contention that each of Plaintiff’s seven causes of action hinges on a finding of
 14 coverage is true. However, as argued above, questions of coverage cannot be adjudicated at the pleading
 15 stage, and Plaintiff has sufficiently pled plausible facts to support each of the causes of action to survive
 16 State Farm’s Motion to Dismiss.

17 **1. Counts 1 Through 4 – Breach of Contract, Breach of Covenant of Implied Faith and
 18 Fair Dealing, Bad Faith Denial, and Declaratory Relief.**

19 Defendant’s sole attack on these causes of action is that all claims derive from the Policy, and if
 20 there is no coverage, there are no claims. Motion at 22:12-15. If the Court denies the Rule 12(b)(6)
 21 motion for the reasons set forth above, there is no other basis to dismiss Counts 1-4.

22 **2. Counts 5 – Unjust Enrichment.**

23 Plaintiff acknowledges that as a matter of law, an unjust enrichment claim does not lie where the
 24 parties have an enforceable express contract. (*California Medical Assn. v. Aetna U.S. Healthcare of
 25 California, Inc.* (2001) 94 Cal.App.4th 151, 172, 114 Cal.Rptr.2d 109.). Plaintiff will withdraw this
 26 cause of action for this Complaint (it was included in other iterations of the complaint against other
 27 carriers where certain defendants claimed no contractual privity).

28 **G. Counts 6 and 7 – Violation of Cal. Bus. & Prof. Code § 17200 (UCL) and Injunctive Relief
 29 Under § 17200.**

30 State Farm’s rapid denial of Plaintiff’s claim violates California UCL laws. Specifically, State
 31 Farm’s bad faith denial meets the definition of unfair business practice in the three recognized

1 definitions of “unfair” under the UCL: (i) unfair (ii) fraudulent or (iii) unlawful. The SAC pleads
 2 conduct which fits all three categories of conduct. SAC at 18:10-20:24, 29:1-31:17.

3 That said, it is true that under California law, a UCL action is equitable in nature (see *Korea*
 4 *Supply Co. v. Lockheed Martin Corp*, 29 Cal. 4th 1134, 1144 (2003)), and the “remedies available in a
 5 UCL action are limited to injunctive relief and restitution,” both of which are equitable remedies. *In re*
 6 *Vioxx Class Cases*, 180 Cal. App. 4th 116, 130 (Cal. Ct. App. 2009). In addition, “it is axiomatic that a
 7 court should determine the adequacy of a remedy in law before resorting to equitable relief,” *Franklin v.*
 8 *Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75-76 (1992).

9 However, the Court does not need to reach this issue until a later procedural juncture in the case,
 10 when there is more certainty as to whether the legal relief sought would, in fact, be “adequate.” A
 11 number of other courts have declined to dismiss UCL claims by a plaintiff because there is no bar to the
 12 pursuit of alternative remedies at the pleadings stage. *Aberin v. Am. Honda Motor Co., Inc.*, 2018 U.S.
 13 Dist. LEXIS 49731, at *26 (N.D. Cal. Mar. 26, 2018). In *Adkins v. Comcast Corp.*, 2017 U.S. Dist.
 14 LEXIS 137881 (N.D. Cal. Aug. 1, 2017), for example, the Court noted that a “few federal courts seem
 15 to have decided that claims for equitable relief should be dismissed at the pleading stage if the plaintiff
 16 manages to state a claim for relief that carries a remedy at law,” but declined to follow suit because the
 17 court was “aware of no basis in California or federal law for prohibiting the plaintiffs from pursuing
 18 their equitable claims in the alternative to legal remedies at the pleadings stage.” *Id.* at *7; *see also*
 19 *Vicuña v. Alexia Foods, Inc.*, 2012 U.S. Dist. LEXIS 59408 (N.D. Cal. April 27, 2012); *see also Deras*
 20 *v. Volkswagen Grp. of Am., Inc.*, 2018 U.S. Dist. LEXIS 83553, at *19 (N.D. Cal. May 17, 2018)
 21 (declining to dismiss UCL claim because plaintiff has adequate remedy at law on ground that there is
 22 “no bar to the pursuit of alternative remedies at the pleading stage.”)

23 From a relief standpoint, injunctive relief is appropriate when insurance companies like State
 24 Farm chose to litigate the issue instead of expending good faith effort to investigate the claims to see
 25 whether some form of coverage is available to the policyholders, who desperately needed (and still
 26 need) the funds to literally survive the ongoing pandemic.

V. CONCLUSION

For the reasons stated above, Plaintiff requests that the Court deny State Farm's Motion to Dismiss for Failure to State a Claim. If the Court grants any part of the Motion in view of this evolving area of law and for the reasons set forth in *Mudpie*, the Court should grant leave to amend.

DATED: September 21, 2020

Respectfully Submitted by,

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